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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 513

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

vs.

GERALD JOSEPH LAVOIE,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING

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RESPONDENT'S PETITION FOR A REHEARING

Comes now respondent and, pursuant to Rule 58(1), hereby petitions for a rehearing of the judgment or decision of this Court entered on June 5, 1967, reversing the judgment of the Court of Appeals for the Ninth Circuit.

This Court's *per curiam* opinion is based solely on its decision in *Boutilier v. Immigration and Natural-*

ization Service, 387 U.S. ....., decided May 22, 1967. In that case, the only issue decided was that the phrase "psychopathic personality" in the statute, 8 USC 1182(a)(4), was not unconstitutionally vague and indefinite. While that question was also in this case, there are two other questions in this case that were not in *Boutilier.*

(1) This respondent challenged (R. 204) the deportation order upon the ground that it was not, as required by the statute, 8 USC 1252(b)(4), based upon "reasonable, substantial and probative evidence" that respondent was a homosexual and therefore (as now interpreted by *Boutilier*) subject to deportation.

(2) This respondent asserted that evidence obtained from him in violation of both the statute, 8 USC 1252(b)(2), and the Fifth Amendment, because he was not advised of his right to counsel, was used against him over his timely objection (R. 104-5).

Neither of these questions was presented in *Boutilier* and therefore the judgment in respondent's case should not have been summarily reversed on the basis of *Boutilier.*

Appended hereto are excerpts from the respondent's briefs filed in the Court of Appeals demonstrating that either of these points fully supports the decision below.

With reference to the matter of the denial of counsel, respondent calls attention to the fact that this Court has, within the past several weeks, held that the

right to counsel and the privilege against self incrimination[1] are applicable in other than technically criminal proceedings. *In re Gault*, 387 U.S. ....., decided May 15, 1967. The rationale of *Gault* should certainly apply to a proceeding which, as Mr. Justice Brandeis said, "may result also in the loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings,[2] the Fifth Amendment affords protection in its guarantee of due process of law." *Ng Fung Ho v. White*, 259 U.S. 277, 284-5.

For the foregoing reasons, respondent prays that this petition for a rehearing be granted and that certiorari be thereupon denied, because the judgment of the Court of Appeals is supportable on either of the grounds mentioned above. If certiorari is granted, respondent prays that the judgment of reversal be set aside and that the case be set down for argument so that he may have an opportunity to brief and argue

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[1]That respondent did not have counsel is undenied (R. 104-5). Therefore, the *pro forma* waiver of his privilege against self incrimination (R. 197) does not meet the tests of waiver established by this Court's decisions in, *inter alia*, *Johnson v. Zerbst*, 304 U.S. 458, 464, and *Fay v. Noia*, 372 U.S. 391, 439.

[2]We take it that "the sanction afforded by judicial proceedings" embraces at the very least the right to counsel and the right not to incriminate one's self without a knowing waiver. *Miranda v. Arizona*, 384 U.S. 436; *In re Gault*, 387 U.S. ....., 18 L. Ed. 2d at 555, et seq. (Our footnote).

the two points hereinabove referred to, neither of which was present in, or decided by, *Boutilier*.

Dated, San Francisco, California,
June 19, 1967.

NORMAN LEONARD,
Attorney for Respondent.

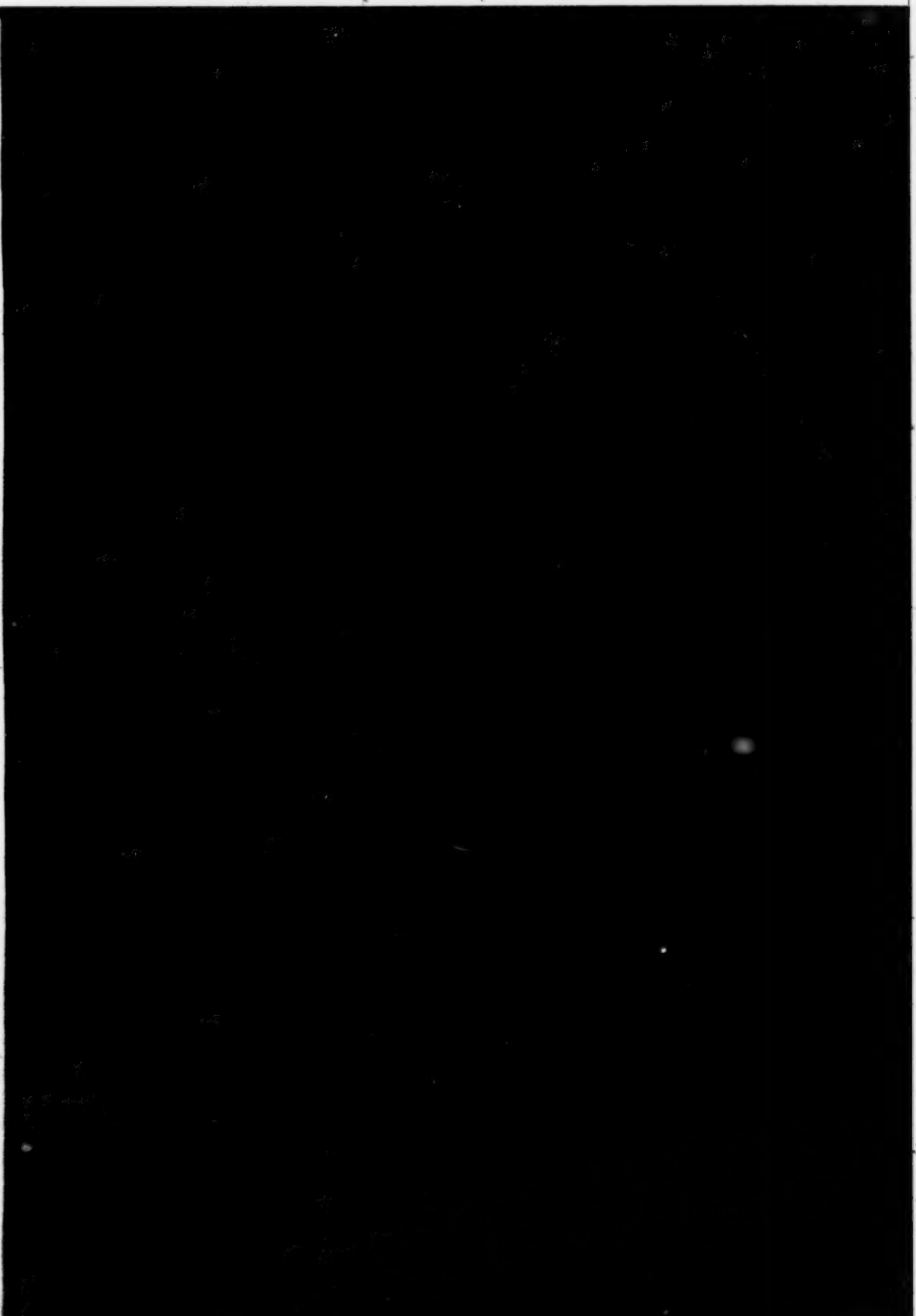
GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
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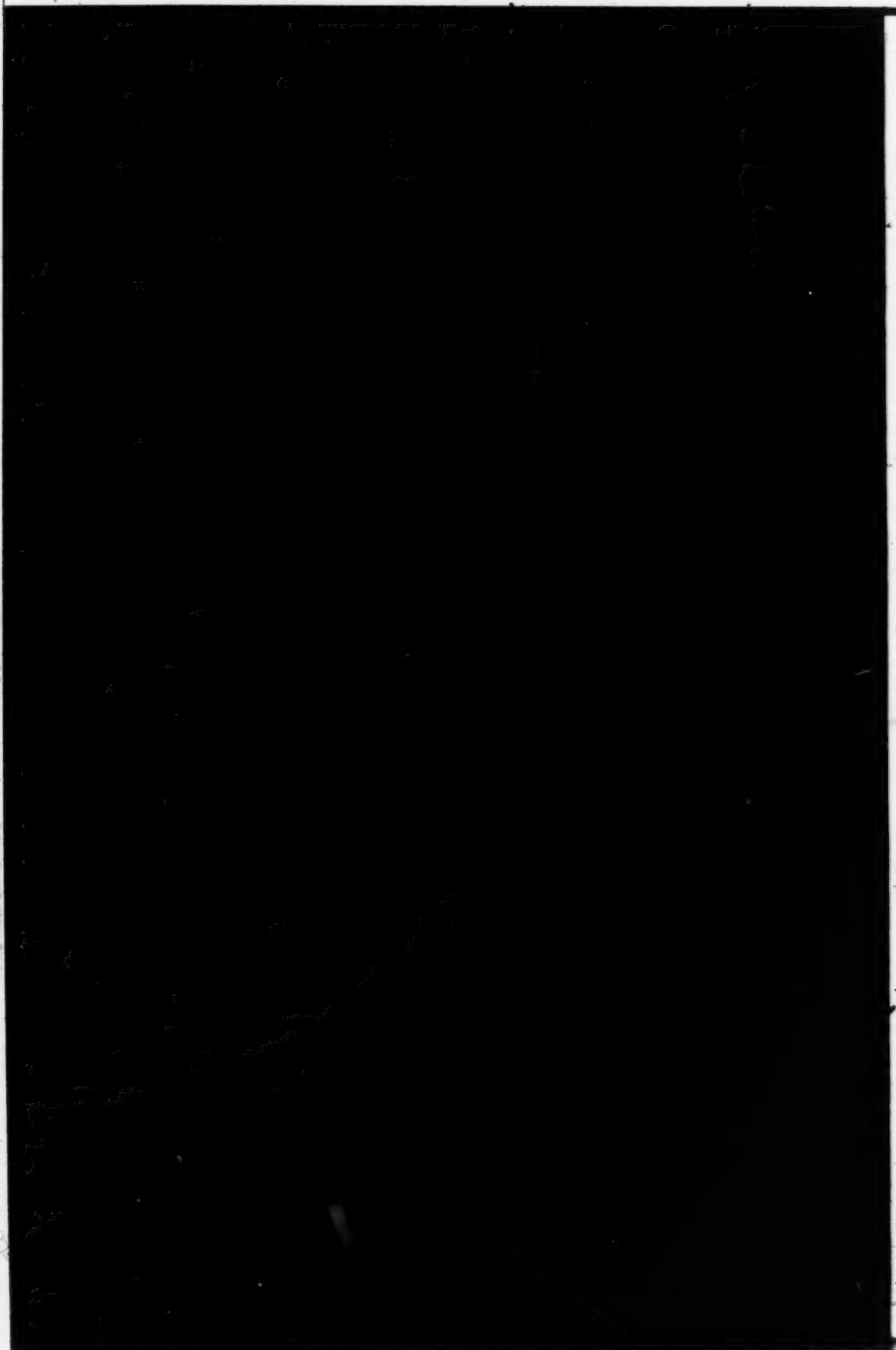
CERTIFICATE OF COUNSEL

I hereby certify that, in my judgment, the annexed petition for a rehearing is well founded and that it is not interposed for delay.

NORMAN LEONARD.

(Appendix Follows)





Appendix

Excerpts from respondent's* opening brief in the Court of Appeals.

I

THE EVIDENCE DOES NOT SUPPORT THE FINDING THAT PETITIONER WAS "AFFLICTED WITH A PSYCHOPATHIC PERSONALITY".

The Special Inquiry Officer "found" (1) that petitioner had "engaged in homosexual acts over an extended period of time", (2) that, therefore, petitioner was a "homosexual", (3) that "as such" petitioner was a sexual deviate, and (4) that petitioner was therefore deportable as one "afflicted with a psychopathic personality" (R. 19).

It is submitted that the evidence does not support these findings. In this connection it must be remembered that, in Section 242(b)(4) of the Act (8 USCA 1252[b][4]), Congress has decreed that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence". See *Gastelum-Quinones v. Kennedy,* 374 U.S. 469, 479; cf. *Bridges v. Wixon,* 326 U.S. 135, 154-156.[3] To reach his conclusion that petitioner was deportable, the Special Inquiry Officer had to build an elaborate struc-

*In reading these excerpts it must be remembered that respondent here was the petitioner below.

[3]The Court of Appeals for the Second Circuit has just recently held that in cases involving "long-time resident aliens" the government should be required to carry the even higher burden of proving "beyond a reasonable doubt" the facts upon which deportation depends. *Sherman v. Immigration and Naturalization Service,* ..... F.2d ....., 34 U.S.L. Week, 2169-2170 (C.A. 2, September 22, 1965). We need not go so far in this case. Here there is simply no "reasonable, substantial, and probative evidence" to sustain the order.

ture, no level of which was supported by its purported underpinning.

The evidence consists of (1) a statement made by petitioner to an agent of the Immigration and Naturalization Service (R. 187-195),[4] (2) a written report by a government psychiatrist (R. 196-198),[5] and (3) oral testimony of the government psychiatrist (R. 25 et seq. and 112 et seq.) and of a defense psychiatrist (R. 153 et seq.).[6]

From this entire record it is clear that petitioner, now 41 years of age, first observed, about 20 years ago, that his sexual urges were directed toward other males (R. 189) but that he did nothing about this then

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[4]When this statement, which was the basis of significant adverse findings (R. 3, 17, 63, 97), was taken, petitioner was not advised of his right to counsel (R. 104-105). See *infra*, III, for a discussion of the legal significance of this fact.

[5]The manner in which the psychiatrist's interview was procured raises disquieting questions about how the Service operates. At the time the investigator was taking the statement and when petitioner was without counsel, the petitioner was asked whether he would "be willing to discuss your problems with a United States Public Health psychiatrist" and answered that he would (R. 192). During the course of that "discussion", the psychiatrist by his own admission "took advantage" of petitioner's guilt feelings about his sexual problems to secure what the psychiatrist regarded as an "admission of damaging facts" (R. 197).

In fact, as we shall see, the "admission" is not damaging at all, as the government doctor ultimately conceded.

[6]It is instructive to compare the qualifications of the two doctors. Dr. Beittel is a relatively young man whose psychiatric experience was comparatively limited (R. 113-114), while Dr. Diamond is a psychiatrist of over 20 years experience with impressive credentials both in the medical, academic and military worlds (R. 154-155). It is also instructive to note that the government psychiatrist spent a brief hour with petitioner (R. 142) and conceded that if he could have had more time he might well have changed his views about petitioner (R. 87, 91, 121, 142), whereas Dr. Diamond spent at least eight times as long with petitioner over an extended period of time for both examination and treatment (R. 155).

believing "it was just a passing phase" *(ibid.)*. In the statement to the Immigration and Naturalization Service investigator, petitioner reported that from 1946 to 1948, he had perhaps half a dozen homosexual "experiences".[7] From 1948 until 1959 he stated that he had such "experiences" at the rate of one or two a month (*ibid.*) and from 1959 to 1961 only a total, all told, of five or six such "experiences" (R. 190). During the same periods of time he engaged in *heterosexual* intercourse at least 30 times (*ibid.*).

We do not believe that this history constitutes "reasonable, substantial, and probative evidence" to support the finding that petitioner had "engaged in homosexual *acts* over an extended period of time". Yet upon this uncertain basis the Special Inquiry Officer erected the first level of his structure. That is, based upon this finding, he drew another finding: that petitioner was a "homosexual". However, a review of the evidence does not at all establish that petitioner is indeed a homosexual.

The government doctor reported that petitioner's characterization of himself as a homosexual was "not completely correct" (R. 197). He pointed out that petitioner's major mode of sexual gratification since puberty and continuing up to the present time had been masturbation (not homosexuality) *(ibid.)*. In his oral testimony the government doctor made it clear that an "admission" of homosexuality such as that

[7] It is clear that when petitioner spoke of "homosexual experiences" he included other matters besides overt physical contact. He was also referring to "any kind of even thought or glance or look at another man . . ." (R. 180) that never even ripened into overt behavior.

made by the petitioner at the time of the original interrogation was unreliable because often in these cases such an admission was simply not true (R. 119; see Dr. Diamond to the same effect at R. 174-175). The government doctor testified that he could not say that petitioner was a homosexual.

> "Q. Now, I notice in your report that you have some doubt in your mind as to whether Mr. Lavoie is a homosexual. Do I properly state that?
>
> A. That's correct.
>
> Q. In other words, as you sit there now, you wouldn't positively state that Mr. Lavoie is a homosexual?
>
> A. No, I wouldn't." (R. 117-118)

Thus the finding that petitioner "is a homosexual" is simply not supported by the evidence.

However, from this unsupported finding the Special Inquiry Officer took the next step. He found that "as such" (i.e., as a homosexual) petitioner was a "sexual deviate" (R. 19). This finding flies squarely in the face of the government's own testimony on this point:

> "Q. . . . but would that [homosexuality] necessarily make him a sexual deviate?
>
> A. [by Dr. Beittel] Are you asking are all homosexuals sexual deviates?
>
> Q. Yes.
>
> A. No, they are not." (R. 50)

From the "finding" that petitioner was a "sexual deviate", the Special Inquiry Officer finally got to the conclusion the Service wanted: petitioner was deportable as one "afflicted with a psychopathic personality".

However, the record demonstrates that even if petitioner were a "sexual deviate" that does not automatically make him a person afflicted with a "psychopathic personality". On the contrary, the evidence is uncontradicted that homosexuality and sexual deviation may be—and more often than not are—rooted in neuroses and not in psychoses.[8] The government doctor was clear on this point both in general (". . . the majority of homosexual behavior is on a psychoneurotic basis" [R. 55]) and specifically as to petitioner (". . . evidence could be mustered" for the "interpretation" that petitioner was "suffering fundamentally from a psychoneurotic rather than a personality disorder" [R. 197]).

Dr. Beittel testified at the hearing:

"Q. You say that Mr. Lavoie may be neurotic and that could cause these difficulties?

A. Yes.

Q. In other words, he could be simply neurotic and not sexually deviate in a psychiatric sense?

A. Yes.

Q. And he could be neurotic and not homosexual?

A. Yes." (R. 142)[9]

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[8]Dr. Beittel acknowledged that if a person is "suffering from some sort of a neurosis, that wouldn't mean that he was psychotic at all in any sense . . ." and that "there is a distinction psychiatrically between neurosis and psychosis" (R. 142).

[9]Compare with Dr. Beittel's testimony the substantially similar views of Dr. Diamond on the point (R. 166-167, 172). The significance of these last observations is obvious: whatever else Congress may have done in Section 212(a)(4), it did not command the exclusion—and therefore, in Section 241(a)(1), the deportation—of persons suffering from neuroses.

This being so, one wonders how Dr. Beittel reached the "diagnosis"[10] which he did in this case. The answer is that, like the government doctor in *Fleuti,* he was *"required* . . . so to certify *anyone* who is a sex deviate" (302 F. 2d at 657; italics supplied) (R. 132-133).

While his professional medical opinion was that the manual "should be revised" because "the definitions need to be more extensive and more precise [and because] . . . [t]here are difficulties in using it in its present form" (R. 41), he nonetheless agreed that if the Service "tell[s] you that the legal term [psychopathic personality] is the equivalent of 'personality disorder' " he would accept "that" (R. 42). Yet he had just immediately previously testified that "I can't say whether it is equivalent or not" (R. 42) and he testified shortly thereafter that to make such an equivalence "doesn't make sense" (R. 45).

Furthermore, the "requirement" of the manual that every sex deviate should be certified as a psychopathic personality is totally contrary to Dr. Beittel's psychiatric training, which tells him that this is simply not true, that sexual deviation can be based upon neuroses (R. 31, 50) as well as upon "psychopathic personality" (whatever that means), and that,

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[10]This "diagnosis", based upon a single hasty interview, was at best "tentative" (R. 142) and was admittedly subject to revision upon further examination (R. 111, 121, 142). Indeed, given further opportunity to study the problem, Dr. Beittel conceded that he might well have agreed with Dr. Diamond that petitioner was not "afflicted with a psychopathic personality" but was merely suffering from a neurosis (R. 38).

indeed, "the majority of homosexual behavior is on a psychoneurotic basis" (R. 55).

The conclusion that petitioner is "afflicted with a psychopathic personality" was, at best, forced upon the doctor by the "requirements" of a government manual. It is surely not supported by evidence, much less by "reasonable, substantial, and probative evidence".

We have heretofore reviewed principally the evidence produced by the government. Even unchallenged, this evidence fails to support the deportation order. When one considers also Dr. Diamond's testimony[11] and applies to the entire record the rule of *Universal Camera v. National Labor Relations Board,*

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[11]As a result of Dr. Diamond's extensive examination, he concluded that petitioner was not afflicted with a "psycopathic personality", but rather was suffering from "an emotional disturbance, emotional illness, which I consider to be psycho-neurotic" (R. 157). Dr. Diamond found "no evidence at all of a character disorder, psychopathic or otherwise" (R. 158-159). At the most, Dr. Diamond could find that on occasion petitioner had exercised poor judgment, but that this had not been the result of a psychopathic condition but "the result of an emotional confusion about certain aspects of sexuality. I do not even regard him as a homosexual in any sense of the word" (R. 161).

The doctor pointed out the absence of factors which characterize the "true homosexual": no molesting of children, no interest in adolescents, no sustained relationships "with some abnormal individual in any perverted way", no feminine characteristics, no love affairs with men (R. 162-163). The homosexual "experience" (see n. 7, *supra*) were "extremely superficial, extremely casual" (R. 163) and ". . . in between the scattered homosexual contacts he has had perfectly normal relationships with women" (R. 162).

In sum, Dr. Diamond believed that petitioner had "a relatively mild type of emotional disturbance characterized chiefly by some confusion as to sexuality . . . and I think we clarified this in [the] second therapeutic visits [sic]. And I think he knows quite well where he stands now . . ." (R. 169). Petitioner was (and is) willing to undergo psychiatric treatment but Dr. Diamond does not think this is now necessary (R. 168).

340 U.S. 474,[12] it becomes doubly clear that the evidence simply will not support the order. For this reason alone the order of deportation should be set aside.

* * * * * * *

III

PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE, ALTHOUGH HE WAS NOT ADVISED OF HIS RIGHT TO COUNSEL, STATEMENTS MADE BY HIM WHILE UNDER INTERROGATION WERE USED AGAINST HIM.

Massiah v. United States, 377 U.S. 201, teaches us that the Sixth Amendment guarantees the right to counsel to a federal criminal defendant who is "under interrogation by the police" (377 U.S. at 204) and *Escobedo v. Illinois,* 378 U.S. 478 that when an investigation begins to fix upon a particular person he is entitled to counsel; that at that point the due process clause of the Fourteenth Amendment (and certainly this must be equally true of the due process clause of the Fifth Amendment) requires that he be advised of that fact; and that if he is not, "no statement elicited . . . during the interrogation may be used against him . . ." (378 U.S. at 491).

In the instant case, it is not disputed that at the time petitioner was first under interrogation by an agent of the Service, he was not advised of his right

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[12] "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight" (340 U.S. at 488).

to counsel (R. 104-105);[16] nor can it be doubted that petitioner and petitioner alone was the sole subject of the investigation.[17] Thus the factual preconditions for the application of the *Massiah-Escobedo* doctrine exist in this case.

The only question is whether because this is a deportation proceeding and not a criminal prosecution the rule should be any different. The answer would clearly appear to be that this should make no difference.

> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon,* 326 U.S. 135, 154.

See also *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10; *Barber v. Gonzales,* 347 U.S. 637, 642; *Delgadillo v.*

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[16]Section 242(b)(2) of the Act provides a procedure to be followed for the determination of deportability and specifically states that in any such proceedings "the alien shall have the privilege of being represented . . . by such counsel . . . as he shall choose" (8 USCA 1252 [b][2]). That the initial interrogation was a part of the deportation proceeding is obvious and it is clear that the Service so regarded it. See n. 17, *infra*.

[17]"Q. . . . Do you understand that this *hearing* is for the purpose of making a determination of *your* legal status under the Immigration laws of the United States and *this will go through a hearing before a Special Inquiry Officer?*

A. Yes, sir, I do.

Q. *Mr. Lavoie,* my investigation discloses that it is possible that *you* are a homosexual . . ." (R. 189; italics supplied).

Carmichael, 332 U.S. 388, 391; *Costello v. Immigration and Naturalization Service,* 376 U.S. 120, 131; *Sherman v. Immigration and Naturalization Service,* ..... F. 2d ....., 34 U.S.L. Week 2169-2170 (C.A. 2d, September 22, 1965).

The statement made at this interrogation was a substantial basis upon which findings adverse to petitioner were made (R. 17, 63-64, 97). Objection was duly made to the admissibility of the statement (R. 104) but was overruled (R. 105).

The error in receiving this evidence against petitioner is, on the facts of this case, of constitutional dimension and requires the setting aside of the order of deportation, independently of the other grounds heretofore urged.

Excerpts from respondent's reply brief in the Court of Appeals.

I

THE ORDER OF DEPORTATION IS NOT BASED UPON REASONABLE, SUBSTANTIAL, AND PROBATIVE EVIDENCE.

The Respondent does not challenge the proposition that, in order to be valid, a deportation order must be based upon "reasonable, substantial, and probative evidence". (Immigration and Nationality Act of 1952, §242[b][4]; 8 USCA 1252[b][4].) It argues, rather, that there is such evidence of Petitioner's "sexual deviation". (Resp. Br. 7.)

The trouble with this argument is:

(1) It simply excerpts one fragment from the record (Resp. Br. 7), ignoring the rest of the evidence

which is set out in voluminous detail in our opening brief (Petn. Br. pp. 9-13). It thereby does violence to the rule of *Universal Camera v. National Labor Relations Board,* 340 U.S. 474, which requires the Court, in determining the substantiality of the evidence, to "take into account whatever in the record fairly detracts from its weight" 340 U.S. at 488. The Respondent simply ignores the impressive testimony of *both* psychiatrists that (a) it is not at all clear that Petitioner is indeed a homosexual (R. 117-118, 162-163, 169); (b) that, even if he were, not all homosexuals are sex deviates (R. 50); and (c) that, even if Petitioner were a sex deviate, that does not make him a "psychopathic personality" (R. 142, 158-159).

(2) It ignores the statutory language upon which the deportation order is based. Even if, contrary to the above, it could be deemed, as the Respondent argues, that there is "reasonable, substantial, and probative evidence" that Petitioner is a sex deviate, that would not make him excludable, and therefore deportable, on the basis of the statute which existed at the time of his entry, and at the time the proceedings against him were instituted. The statutory test, at the time of entry and when the proceedings were instituted, was "psychopathic personality", not sexual deviation. The record is clear that sexual deviation is rooted more often in neuroses rather than psychoses (R. 55, 142, 166-167, 172, 197). Thus, it is clear that there is no substantial, or indeed, any evidence to support a finding that Petitioner falls within the

statutorily excludable class: i.e., a "psychopathic personality".

* * * * * * *

VI

PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE USE OF STATEMENTS OBTAINED FROM HIM WITHOUT ADVISING HIM OF HIS RIGHT TO COUNSEL.

Respondent does not deny that the record contains statements received into evidence against Petitioner under circumstances which bring into play the doctrine of *Massiah v. United States,* 377 U.S. 201 and *Escobedo v. Illinois,* 378 U.S. 478. Respondent argues, however, that because deportation is "not a criminal proceeding" due process does not require that Petitioner be advised of his right to counsel. (Resp. Br. 21.)

The difficulty with this argument is two-fold.

In the first place, while the courts do frequently state that deportation is not a criminal proceeding, they have in fact insisted, because of the dire consequences flowing from deportation, that many of the due process guarantees surrounding criminal proceedings are applicable. *(Bridges v. Wixon,* 326 U.S. 135, 154; *Delgadillo v. Carmichael,* 332 U.S. 388, 391; *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10; *Barber v. Gonzales,* 347 U.S. 637, 642; and *Costello v. Immigration and Naturalization Service,* 376 U.S. 120, 121.) Indeed, in *MacLeod v. Immigration and Naturaliza-*

tion Service, 327 Fed. 2d 453, relied upon by Respondent, this Court reversed and set aside a deportation order, in part, at least, because, while "the niceties of criminal pleading are not required", the order to show cause there failed to inform the alien of the charges he was required to meet. (327 Fed. 2d at 454-455.)

In the second place, even apart from the constitutional aspect of the matter, the procedure here was a violation of the statute itself. Section 242 (b)(2) of the Act (8 USCA 1252 [b]) states that the alien shall have the privilege of being represented by counsel. Here, contrary to the language of the statute itself, Petitioner was not informed of this privilege at the time the incriminating statement was taken from him. (R. 104-5, 187.) In *MacLeod,* the other ground for setting aside the order was the failure of the Service to follow the applicable regulations. (327 Fed. 2d at 454.) We submit that the failure to follow the statute makes the order here at least equally as vulnerable.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

IMMIGRATION & NATURALIZATION SERVICE
v. LAVOIE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 513. Decided June 5, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Boutilier* v. *Immigration and Naturalization Service*, 387 U. S. —, decided May 22, 1967.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be denied.